2012 WL 12069033 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

STATE OF HAWAI'I, Plaintiff-Appellant,

v.

Koalaukani I. RAMOS-SAUNDERS aka Koalaukani Ramos-Saunders, Defendant-Appellee.

No. CAAP-12-0000090.
June 28, 2012.

Appeal from the Findings of Fact, Conclusions of Law and Order
Granting Defendant's Motion to Suppress Evidence filed on 1/13/12
First Circuit Court
Honorable Glenn J. Kim Judge

Opening Brief of the State of Hawai'i Appendix"a" and Certificate of Service

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OPENING BRIEF OF THE STATE OF HAWAI'I

I. STATEMENT OF THE CASE

A. Factual Background

On December 3, 2010, at approximately 7:19 a.m., Honolulu Police Department ("HPD") Officers Angella Zanella ("Officer Zanella," formerly known as Montano) and Joseph O'Neal ("Officer O'Neal") were notified by police dispatch to respond to a "drop 911 call" or an "open line 911 call with static heard" that originated from a phone number registered to a Walter Rosskopf ("Rosskopf"), whose address was provided to them from dispatch as 59-068 Kamehameha Highway, Unit B. JEFS Dkt. #17 at 5, 56-57 (12/21/11 transcript). [1]

A “drop 911 call” occurs when there is “no response heard by the dispatcher,” JEFS Dkt. #17 at 91, or the caller “hangs up,” JEFS Dkt. #17 at 6. As such, the term “drop 911 call” could also include an “open line 911 call with static heard.” JEFS Dkt. #17 at 92. An “open line 911 call” occurs when “someone calls 911 and they leave the phone off the hook[,]” JEFS Dkt. #17 at 57, and what is heard while the line remains open does not alter the significance of an “open line 911 call” to an officer, JEFS Dkt. #17 at 91. A “drop 911 call” where the caller hangs up occurs more frequently than an open line call. JEFS Dkt. #17 at 71. Regardless if the call is a “drop 911 call” where a caller hangs up or an “open line 911 call with static heard,” both types of calls are classified as a “Priority 1” (or emergency) call that requires an officer to respond to “in an expedited manner” and conduct a follow-up investigation. JEFS Dkt. #17 at 57, 71, 91-92. Based on the officers' experience, these types of calls are made because of “numerous things” such as “a sick call [where] someone had a heart attack or someone needs medical [assistance],” JEFS Dkt. #17 at 6, “a fight call,... someone in distress,... [or] someone injured.” JEFS Dkt. #17 at 57. Officer Zanella testified that she has “been to several drop calls where [she] found the person unconscious[,]” JEFS Dkt. #17 at 25, and Officer Tamayori testified that he could recall “three specific instances... in detail... [where he] had to perform CPR on someone....” JEFS Dkt. #17 at 93.

***2** Approximately twenty minutes later, or 7:39 a.m., both officers arrived at Unit B and were met by a woman named Paula Burgess (“Burgess”) who related to the officers that she lived in Unit B. JEFS Dkt. #5 at 108 (FOF 2); JEFS Dkt. #17 at 7, 58. The officers informed Burgess why they were there and that they were looking for Rosskopf. JEFS Dkt. #17 at 9. Burgess responded that Rosskopf used to live in Unit B, but now lived in Unit A, and pointed out Unit A's location to the officers. JEFS Dkt. #17 at 9, 59. Burgess seemed concerned to the officers because she understood that Rosskopf was **elderly** and suffering from health problems - namely, prostate cancer - which she informed the officers of. JEFS Dkt. #17 at 9, 59. The officers asked Burgess if the call came from her house (Unit B), and she responded by saying that the 911 call did not originate from her house. JEFS Dkt. #17 at 72, 87-88.

Although police dispatch gave them the Unit B address, both Officers Zanella and O'Neal were aware that in their experience dispatch sometimes provides them with an incorrect address or unit number. JEFS Dkt. #17 at 54, 73, 87. As such, the officers investigate not only whether the call came from the address provided to them from dispatch, but also the whereabouts of the person that the phone number is registered to. JEFS Dkt. #17 at 54.

Unit A could be seen from Unit B, and was observed to be a one-story “standalone” house located further up a hill approximately 750 feet away from Unit B. JEFS Dkt. #5 at 108 (FOF 3); JEFS Dkt. #17 at 9, 17, 37, 60. Officers O'Neal and Zanella drove in separate cars from Unit B to Unit A. JEFS Dkt. #17 at 74.

After their meeting with Burgess, both officers proceeded to Unit A and, upon their arrival, Officer Zanella knocked on the front door several times, announced her presence, and called out for Rosskopf. JEFS Dkt. #17 at 10. There was no response. JEFS Dkt. #17 at 10. Both officers then walked around the perimeter of the house while continuing to call for Rosskopf by “yell[ing] out and ask[ing] if anybody was in the house.” JEFS Dkt. #17 at 10, 65. There continued to be no response. JEFS Dkt. #17 at 65. While walking around the house, the officers looked into open windows to see if there was anyone inside that may have not heard them or may be injured, but saw no one. JEFS Dkt. #17 at 63.

While both officers walked around the house and called out for anyone that may be home, they noticed an open bedroom window and, through the window, observed on the ground what looked like to them to be a gun with a silencer attached to it. JEFS Dkt. #17 at 10, 64. The officers did not see anyone in the bedroom where the gun was located. JEFS Dkt. #17 at 64. ***3** The officers understood that a silencer (or suppressor) is “a type of device that is typically put on a weapon to make it fire silently and reduce muzzle flash[,]” its illegal, and its only purpose “is to assassinate someone without being detected.” JEFS Dkt. #17 at 64, 96.

Continuing further around the perimeter of the house, the officers observed a sliding glass door that was completely wide open, providing anyone or anything access to the inside of the house. JEFS Dkt. #17 at 12. Through this door the officers observed that drawers were opened and the room was a mess with random items on the floor and counters. JEFS Dkt. #17 at 13, 62, 65. In fact, all the rooms they looked into all seemed to be in disarray with items on the floors. JEFS Dkt. #17 at 65. From outside

of the home, they also observed two large air conditioning window units that were still in operation, and that the lights of the home were still on. JEFS Dkt. #17 at 80.

After making these observations, and continuing to receive no response to their calls, the officers requested for additional police units to assist them at the scene because of the gun they observed. JEFS Dkt. #17 at 13, 76. While they were waiting they continued "calling out police, is anyone home," while outside the open sliding glass door. JEFS Dkt. #17 at 66, 14.

After waiting approximately ten minutes, Officer Nelson Tamayori ("Officer Tamayori") arrived at the scene and was briefed about the situation by the other two officers. JEFS Dkt. #5 at 109 (FOF 8). Officer Tamayori testified that he received an assignment to assist Officers Zanella and O'Neal, and that he arrived on the scene approximately ten minutes after 7:35 a.m. JEFS Dkt. #17 at 90, 99. After being apprised of the situation, the decision was made to enter Unit A to search for any injured people within the unit. JEFS Dkt. #17 at 13-14, 32, 66-67. When all three officers entered Unit A through the open sliding glass door, JEFS Dkt. #17 at 32, 43, they moved to secure the gun first to ensure that nobody had access to it, while simultaneously searching for an injured person, JEFS Dkt. #17 at 15. They observed that the room where the gun was located was a "mess," Officer Zanella jotted down what looked to her like a serial number on the gun, and the officers "checked closets, looking in corners making sure no one was in [that room]...." JEFS Dkt. #17 at 32, 68. The officers did not try to discern whether the gun was either real or a toy at that time because their concern was looking for ***4** Rosskopf or any other person in the room. [2] JEFS Dkt. #17 at 32, 68. However, there was no one in the room where the gun was located. JEFS Dkt. #17 at 32.

After securing the gun the officers continued their search for injured people, including Rosskopf. JEFS Dkt. #17 at 15. The officers moved as a team down a hallway that had doors on each side - the doors to the bathroom and the bedroom where the gun was located were open, while the doors to two other bedrooms and a closet were closed, JEFS Dkt. #17 at 45-46. There were no interior doors to the family room or kitchen, JEFS Dkt. #17 at 45, and it appears that the open sliding glass door opened into the family room, JEFS Dkt. #17 at 46.

During their search for an injured person, the officers detected an odor that appeared to them to be marijuana. JEFS Dkt. #17 at 35. The officers did not detect a marijuana odor until after they entered Unit A. JEFS Dkt. #17 at 35. Prior to opening the doors of the two other bedrooms they observed, the officers knocked on the doors and announced their presence, but received no response. JEFS Dkt. #17 at 35. Upon opening the bedroom doors, the officers observed many marijuana plants growing within the bedrooms, with the first bedroom alone containing at least seventy-five (75) plants, as well as an "airduct system with air conditioning." JEFS Dkt. #5 at 110 (FOF 10); JEFS Dkt. #17 at 16, 35-36. Notwithstanding the officers' observations of the marijuana plants, they searched those two bedrooms for an injured person, Rosskopf in particular, because they believed that Rosskopf lived in Unit A and that there was a reason for the 911 call. JEFS Dkt. #17 at 16, 36. There was also no discussion among the officers to obtain a warrant at that time because the officers' concern was discovering whether any injured people were inside Unit A. JEFS Dkt. #17 at 42.

After searching these two bedrooms, the officers continued their search of the "whole house" for an injured person in the kitchen and family room areas of the home and "then... immediately got out of the house." JEFS Dkt. #17 at 16-17, 43, 47. The officers were unable to find Rosskopf or anyone else inside Unit A. JEFS Dkt. #17 at 16. The officers' search for Rosskopf in the interior of Unit A lasted no longer than five minutes. JEFS Dkt. #17 at 40.

While outside Unit A, Officer Zanella informed a sergeant of her observations inside Unit A, and her and the other officers were thereafter instructed to secure the perimeter of the ***5** premises. JEFS Dkt. #17 at 17. While on scene, Officer Zanella observed a Hawaiian Electric bill with Defendant-Appellee Koalaukani Ramos-Saunders' ("Defendant's") name and the Unit A address. JEFS Dkt. #17 at 75. Before they searched Unit A, the officers were under the impression that the structure consisted of a single level. JEFS Dkt. #17 at 17. However, while securing the perimeter of Unit A, they noticed what appeared to be another unit or basement beneath the unit they searched. JEFS Dkt. #17 at 17, 88. The officers knocked on this other structure

and called out Rosskopf's name. JEFS Dkt. #17 at 17-18. The officers received no response. JEFS Dkt. #17 at 18. Unlike Unit A, the interior of this other structure was inaccessible to the officers because it was locked and secured. JEFS Dkt. #17 at 18.

Sometime after Officers Zanella, O'Neal, and Tamayori searched and vacated Unit A, a search warrant for Unit A was approved as a result of their observations during their prior search of Unit A, and after it was determined that, although Defendant is a current medical marijuana permit holder, Unit A was not listed on his permit as a place authorized as a location to grow and cultivate medical marijuana. JEFS Dkt. #5 at 76. At approximately 9:50 p.m. on the same day, the search warrant was executed and, upon its execution, numerous marijuana plants and growing paraphernalia were recovered, as well as mail and a passport belonging to Defendant. JEFS Dkt. #5 at 76.

B. Procedural History

On January 20, 2011, Plaintiff-Appellant, State of Hawai'i ("the State"), filed an indictment in the Circuit Court of the First Circuit ("circuit court") charging Defendant with committing the offenses of Commercial Promotion of Marijuana in the First Degree and Unlawful Use of Drug Paraphernalia, in violation of Hawai'i Revised Statutes (HRS) § 712-1249.4(1)(a) (1993) and HRS § 329-43.5(a) (1993), respectively. JEFS Dkt. #5 at 10.

On November 30, 2011, Defendant filed a Motion to Suppress Evidence. JEFS Dkt. #5 at 65. Briefly summarized, Defendant asserted that all evidence obtained should be suppressed as fruits of the poisonous tree because the search that Officers Zanella, O'Neal, and Tamayori conducted was allegedly illegal. JEFS Dkt. #5 at 66, 83. In so asserting, Defendant relied primarily on federal law. JEFS Dkt. #5 at 81-88.

On December 15, 2011, the State filed its Memorandum in Opposition to Defendant's Motion to Suppress Evidence. JEFS Dkt. #5 at 91. Briefly summarized, the State responded by asserting that Defendant's motion should be denied because exigent circumstances existed due to ***6** an imminent danger to life. JEFS Dkt. #5 at 92. Although it relied primarily on state law, the State also pointed out that, pursuant to federal law, the decision to enter the residence was reasonable. JEFS Dkt. #5 at 97-101.

On December 21, 2011, the circuit court orally granted Defendant's motion after a hearing was held where the testimonies of Officers Zanella, O'Neal and Tamayori were adduced. JEFS Dkt. #17 at 117-23.

On January 13, 2012, the circuit court filed its Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Suppress Evidence. JEFS Dkt. #5 at 107 (Appendix A).

On February 10, 2012, the State timely filed its notice of appeal. JEFS Dkt. #1 at 1.

II. STATEMENT OF THE POINT OF ERROR ON APPEAL

A. The Circuit Court Erred By Granting Defendant's Motion To Suppress Evidence.

The State challenges the circuit court's order granting Defendant's Motion to Suppress Evidence. *See* JEFS Dkt. #5 at 112.

The State challenges Findings of Fact Nos. 1 (in part), 4, 5, 7 and 10 (in part) which state:

1. ... Police information was that there was a landline telephone registered to Rosskopf at [Unit B, 59-068 Kamehameha Highway].

4. The officers did not conduct any further investigation of the drop call at Unit B; they did not question Burgess further, nor did they check the house to determine whether Rosskopf or anyone else who might have been inside needed assistance. Instead, they went directly to Unit A.

5. Upon their arrival at Unit A, the officers knocked on the front door and got no response. They then walked around the exterior of the house, calling out to anyone who might be inside, but again got no response. The officers reported no indications such as voices or perceived movement coming from inside the house which could have suggested to the officers that anyone was inside the house at that time. Nor did they at any time see any person inside the home.

7. Upon making the foregoing observations, and continuing to receive no response to their calls from outside the house, the officers requested additional police units to assist them at the scene. They remained outside the house while they waited for the arrival of the additional police units.

10. ... No person was ever found or located in the house at that time.

***7** JEFS Dkt. #5 at 108-10.

The State also challenges the court's Conclusions of Law Nos. 5 and 7, which state:

5. Exigent circumstances exist when "immediate police response is reasonably required 'to prevent imminent danger to life or serious damage to property, or to forestall the likely escape of a suspect or the threatened removal or destruction of evidence." *State v. Vinuya*, 96 Hawai'i 472, 488, 32 P.3d 116, 132 (2001) (quoting *State v. Lloyd*, 61 Hawaii 505, 512, 606 P.2d 913, 918 (1980)).

7. Under the totality of the circumstances in this case, the police officers who conducted the warrantless entry and search of the house in question did not have specific and articulable facts which established an imminent danger to life or serious damage to property or the likely escape of a suspect or the threatened removal or destruction of evidence. In short, there were insufficient facts from which to conclude that there existed exigent circumstances justifying the warrantless entry and search of the house, and therefore such entry and search were illegal.

JEFS Dkt. #5 at 111-12.

The circuit court's Findings of Fact, Conclusions of Law, and Order does not fully explain its reasoning for its Conclusion of Law No. 7. The court's reasoning is instead supplied by its oral findings and conclusions at the hearing on Defendant's motion, as follows:

THE COURT:...

And like I said, I think it's very clear to me that they made a mistake by going to Unit A and following the name rather than following the source of the call, because this whole thing started because of drop/open 911 call. And, you know, it's so potentially serious... then you got to stick with where the phone, which they didn't do there and they got kind of confused there. And I can kind of understand that, but that's what they did. But I'm not, you know, I'm not granting the motion based on that....

... The fact is, they entered the house, they went in, they conducted a search and they did not have a warrant to do so. It was a warrantless search, I think.

So the question is whether they... can claim one of the legal exceptions to a warrantless search. And I think the only one that applies here is what both counsel pointed out and I agreed with it, its the exigent circumstances.

Okay, exigent circumstances exist when immediate police response is reasonably required to prevent; one, imminent danger to life....

***8** Imminent, according to the American Heritage Dictionary of the English Language means, about to occur, now, in other words, imminent, about to occur about to happen now. Classic instances would be, you know, the police come to a house on a drop 911 call,... and they see somebody chasing somebody around inside the house with a knife or a gun; or somebody, you know, a guy beating his wife up in the living room, or they hear sounds of a struggle or sounds of yelling or screaming, something like that.

Those are arguably exigent circumstances because they are specific and articulable facts that would justify the police in thinking that there's imminent danger... and those are the kind of exigent circumstances that would justify them going right into the house at that point, okay.

I frankly believe Officer[s] Zanella and O'Neal. I think Officer Tamayori's memory is a little faulty here. Because when he got there they went ahead and did a search again. He's a senior officer. They called him specifically. It's pretty clear to the Court, it's a pretty clear inference that both Zanella and O'Neal were not that experienced. Officer Tamayori is more experienced. And they called him out there to run it by him to see what they should do.... They waited for him to show up. They discussed it and then... at that point the decision was made to enter. And she said it took 10 minutes, maybe, for Tamayori to show up.

That's not exigent circumstances, it's not even close. Exigent circumstances is where the police have to immediately respond. They have to go into that house even though they don't have a warrant because there's an imminent danger to life. It's not even close here.

Okay, they saw a gun, what looked to them like a gun and a silencer in a room of the house. They themselves said, nobody is answering their calls. They never saw anybody in the house. Low and behold there was nobody in the house. Nobody is holding the gun. Nobody is in close proximity to the gun. It's just lying on the bedroom floor. Nothing prevented them at that point to seal the situation, maybe surround the house, call for further back-up and get a search warrant.

And I take their point that... it's suspicious and all of that. But I don't see how by any stretch of the imagination they had specific and articulable facts to show them that there was an imminent danger to life such that they have to go into the house.

[Regarding the officers waiting outside for ten minutes for Officer Tamayori to arrive and then discussing the situation with him], [i]t's not exigent circumstances, quite the opposite, it was a considered decision on their part to enter the house.

Now, I'm not necessarily second-guessing them. And I'm not saying that they shouldn't have gone in because maybe somebody was, you know, hurt or something. And that's why I say, if the State chooses to take me up on this, maybe we'll get some new law. Maybe the appellate courts will disagree with me and say, no, it's not just imminent danger to life, but in a situation like this, it was reasonable for them to go in the ***9** house, and they'll reverse me... But as I read the law now, they needed exigent circumstances and they did not have them to enter the house. It was an illegal warrantless search. The motion is granted.

JEFS Dkt. #17 at 119-23. Because these oral findings and conclusions supplement the circuit court's written Findings of Fact, Conclusions of Law, and Order, the State also challenges these oral findings and conclusions.

On November 30, 2011, Defendant filed a Motion to Suppress Evidence. JEFS Dkt. #5 at 65. The State objected to Defendant's motion when it filed its Memorandum in Opposition to Defendant's Motion to Suppress Evidence. JEFS Dkt. #5 at 91. Again, although it relied primarily on state law, the State also pointed out that, pursuant to federal law, the decision to enter Unit A was reasonable. JEFS Dkt. #5 at 97-101. The State advanced two reasons why it was reasonable for the officers to enter Unit A: (1) the totality of the circumstances indicated that someone was not only home at the time, but also injured because of a health problem; or (2) the totality of the circumstances indicated that someone was home at the time and had been shot, committed suicide, or that “foul play” was afoot. JEFS Dkt. #5 at 99-100.

III. STANDARD OF REVIEW

An appellate court reviews "the circuit court's ruling on a motion to suppress *de novo* to determine whether the ruling was 'right' or 'wrong."' *State v. Edwards*, 96 Hawai'i 224, 231, 30 P.3d 238, 245 (2001) (internal quotation marks and citation omitted). "In doing so," an appellate court adheres to the following precepts:

factual determination made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. The circuit court's conclusions of law are reviewed under the right/wrong standard.

Id. (citation omitted); *see State v. Lloyd*, 61 Haw. 505, 512, 606 P.2d 913, 918 (1980) ("[T]he question of exigency is addressed to the factfinding function of the trial court, and its findings in that regard will not be set aside unless determined to be clearly erroneous.").

The right/wrong standard that applies to a review of the circuit court's conclusions of law "allows the appellate court to 'examine the facts and answer the question without being required ***10** to give any weight to the trial court's answer to it."' *State v. Kaleohano*, 99 Hawai'i 370, 375, 56 P.3d 138, 143 (2002) (citation omitted). "Thus, '[a conclusion of law] is not binding upon the appellate court and is freely reviewable for its correctness." *Id.* (citation omitted).

However, where a conclusion of law "presents mixed questions of fact and law," that conclusion of law "is reviewed under the clearly erroneous standard because the court's conclusions are dependent upon the facts and circumstances of each case." *State v. Crouser*, 81 Hawai'i 5, 10, 911 P.2d 725, 730 (1996). Inasmuch as the question of whether an exigent circumstance exists is dependent on the totality of the circumstances of each case, the clearly erroneous standard of review should also apply to those conclusions of law relating to an exigent circumstance and present mixed questions of fact and law. *See id.; accord Lloyd*, 61 Haw. at 512, 606P.2d at 918.

"'[T]he proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his [or her] own... rights were violated..."' *Edwards*, 96 Hawai'i at 232, 30 P.3d at 246 (citation omitted). "The proponent of the motion to suppress must satisfy this burden of proof by a preponderance of the evidence [.]" *Id.* (citation omitted).

IV. *ARGUMENT*

A. The Circuit Court Clearly Erred In Finding and Concluding That an Exigency Did Not Exist Under the Circumstances Of This Case.

Both the Fourth Amendment to the United States Constitution and Article 1, section 7 of the Hawai'i Constitution protects the right of the people to be secure in, among other things, their "houses" against unreasonable searches and seizures. *See*U.S. Const. amend. IV; Haw. Const. art. I, § 7; *see also State v. Heapy*, 113 Hawai'i 283, 285 n.2,151 P.3d 764, 766 n.2 (2007) ("Article I, section 7 of the Hawai'i Constitution is identical to the Fourth Amendment to the United States Constitution."). "[T]he primary purpose of both the Fourth Amendment and article I, section 7 'is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."' *State v. Lopez*, 78 Hawai'i 433, 441, 896 P.2d 889, 897 (1995). With regard to an individual's expectation of privacy, "[t]here is no question that a person generally has an actual, subjective expectation of privacy in his or her home. Nor is there any question that the expectation of privacy in one's home is one that society recognizes as objectively ***11** reasonable." *Id.* at 442, 896 P.2d at 898. As such, "[t]he Fourth Amendment draws a firm line at the entrance of the home, and in the home all details are intimate details, because the area is held safe from prying government eyes." *State v. Line*, 121 Hawai'i 74, 85, 214 P.3d 613, 624 (2009) (citation, emphasis, and internal quotation marks omitted).

"Because of the special privacy interest in the home, '[i]t is now settled that any warrantless entrance of a private dwelling by the police can only be justified under the 'exigent circumstances' exception[] to the warrant requirement of the Fourth Amendment[.]"' *Id.* (citation and internal quotation marks omitted). As currently explained in this jurisdiction, the exigent circumstances exception

exists when the demands of the occasion reasonably call for an immediate police response.More specifically, it includes situations presenting an *immediate danger to life or serious injury* or an immediate threatened removal or destruction of evidence. However, the burden, of course, is upon the government to prove the justification..., and whether the requisite conditions exist is to be measured from the totality of the circumstances. And in seeking to meet this burden, the police must be able to point to specific and articulable facts from which it may be determined that the action they took was necessitated by the exigencies of the situation.

State v. Jenkins, 93 Hawai'i 87, 102, 997 P.2d 13, 28 (2000) (citation omitted, emphases added); *see State v. Clark*, 65 Haw. 488, 494, 654 P.2d 355, 360 (1982) (same).

In *Lloyd*, 61 Haw. at 512 n.5, 606 P.2d at 918 n.5, the Hawai'i Supreme Court noted that an example of a warrantless entry "to prevent [an] imminent danger to life" is "where a grave offense has been committed and the suspect is reasonably believed to be armed and dangerous" such that "time would be of the essence." In this situation, "[i]mmediate police action would not be proscribed where delay would likely endanger the officer's lives or the lives of others." *Id.*

During the hearing on Defendant's motion, the circuit court was clearly under the impression that an imminent danger to life is present only where the circumstances paint a picture similar to *Lloyd's* description of an imminent danger to life. JEFS Dkt. #17 at 120-21 (opining that "[c]lassic instances" of an imminent danger to life "would be... the police come to a house on a drop 911 call, say, and they see somebody chasing somebody around the house with a knife or a gun; or somebody, you know, a guy beating his wife up in the living room, or they hear sounds of a struggle or sounds or yelling or screaming, something like that"). By focusing its inquiry on whether a criminal offense was occurring in an officer's presence, the circuit court ***12** clearly did not consider whether providing emergency aid to the occupants of a home is sufficient to constitute an exigent circumstance.

1. Exigent circumstances include providing emergency aid.

Indeed, a police officer's search of a person's home to determine whether any of the home's occupants require emergency aid because of, for example, a heart attack, is dissimilar from the situation where a police officer searches a home to investigate or prevent criminal activity. *See United States v. Najar*, 451 F.3d 710, 714-15 (10th Cir.), *cert. denied*,549 U.S. 1013 (2006) (explaining that "the emergency aid exigency" is "informed by the practical recognition of critical police functions quite apart from or only tangential to a criminal investigation"); *see also Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*,375 U.S. 860 (1963) ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."). In this connection, the exigent circumstances exception to the warrant requirement "permit[s a] warrantless entry in an 'emergency' requiring preventative action, even though no crime has been committed." *Duquette v. Godbout*, 471 A.2d 1359, 1362 (R.I. 1984); *accord Jenkins*, 93 Hawai'i at 102, 997 P.2d at 28 (explaining that an exigent circumstance generally "exists when the demands of the occasion reasonably call for an immediate police response").

The Hawai'i Supreme Court has recognized that exigent circumstances include situations where a police officer is "faced with any sort of 'emergency."' *State v. Bonnell*, 75 Haw. 124, 138, 856 P.2d 1265, 1273 (1993) (explaining that, under the circumstances, "there were obviously no special or exigent circumstances that would have justified a warrantless search in [its case]" because "it can hardly be said that the [Mau'i Police Department] was faced with any sort of 'emergency"') (quoting *United States v. Torres*, 751 F.2d 875, 880 (7th Cir. 1984), *cert. denied*,470 U.S. 1087 (1985)); *see Torres*, 751 F.2d at 780 ("A search without a warrant certainly is permissible in an emergency[.]"). Other than mentioning that an "emergency" may constitute an exigent circumstance, *see Bonnell*, 75 Haw. at 138, 856 P.2d at 1273, and explaining what would constitute

a warrantless entry to prevent an imminent danger to life, *see Lloyd*, 61 Haw. at 512 n.5, 606 P.2d at 918 n.5, the State is unaware of any Hawai'i appellate decision that has expounded upon an appropriate standard that may be used in discerning the circumstances under which a police officer's warrantless entrance into a private dwelling is ***13** justified to provide emergency aid to any of its occupants therein, or to search for any occupants that requires emergency aid.

The exigent circumstance exception to the warrant requirement manifestly recognizes that among a police officer's duties and responsibilities include responding to emergency situations. *See Bonnell*, 75 Haw. at 138, 856 P.2d at 1273; *see also United States v. Vale*, 399 U.S. 30, 35 (1970) (observing that an "exceptional situation" justifying a warrantless search of a dwelling did not exist in its case because the officers were neither "*responding to an emergency*[,]" "in hot pursuit of a fleeing felon[,]" nor were "[t]he goods ultimately seized... in the process of destruction" or "removed from the jurisdiction" (emphasis added)). In this regard, "[t]he role of a peace officer includes" not only "preventing violence and restoring order," but also "rendering first aid to casualties." *Brigham City v. Stuart*, 547 U.S. 398,406 (2006). Further:

> [B]y design or default, the police are also expected to reduce the opportunities for the commission of some crimes through preventative patrol and other measures, aid individuals who are in danger of physical harm, assist those who cannot care for themselves, resolve conflict, create and maintain a feeling of security in the community, and provide other services on an emergency basis.

United States v. Snipe, 515 F.3d 947, 953 n.6 (9th Cir. 2008) (quoting 3 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 6.6 (4th ed. 2004)); *see State v. Elderts*, 62 Haw. 495, 499-500, 617 P.2d 89, 92-93 (1980) (recognizing that, where the circumstances show that "the need to act quickly [is] essential," "the constitution does not require... police officers to break off their pursuit to seek a warrant and chance violence or escape by the suspects" because "[t]o do otherwise would [be] poor police work").

Recognizing the multiple roles of a police officer, the Supreme Court has held that where the totality of the circumstances indicate that it is objectively reasonable for officers to enter a home to search for occupants that may require emergency aid, the federal constitution does not require a police officer to obtain a warrant to search a home in order to provide emergency aid to any person therein. *See Brigham City*, 547 U.S. at 403 ("One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury."); *see also Torres*, 751 F.2d at 780; *Patrick v. State*, 227 A.2d 486, 489 (Del. 1967) ("The preservation of human life is paramount to the right of privacy protected by search ***14** and seizure laws and constitutional guaranties; it is an overriding justification of what otherwise may be an illegal entry.").

2. The objectively reasonable standard.

In this connection, the reasonableness standard "is an objective one," and "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" - "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments [] in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Conner*, 490 U.S. 386, 396-97 (1989); *see Wayne*, 318 F.2d at 212 ("[T]he business of policemen and firemen is to act, not to speculate or meditate on whether [a] report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response.").

A court that reviews a situation confronted by a police officer does so "far removed from the scene and with the opportunity to dissect the elements of the situation." *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012) (per curiam). As such, the Supreme Court has admonished against assessing the situation in a manner that "second-guess[es that] officer's assessment, made on the scene, of the danger presented by a particular situation[,]" because a court's assessment of the situation is ultimately made "with the benefit of hindsight and calm deliberation[.]" *Id.* at 992. Instead, "the proper perspective" is that "of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events...." *Id.*

Several of the Court's cases demonstrate this "proper perspective." *In Mincey v. Arizona*, 437 U.S. 385, 387 (1978), a police officer knocked on the door of an apartment that was occupied by the defendant, and was accompanied by nine plainclothes officers and a deputy county attorney. The police officer who knocked on the door was undercover and had previously arranged to purchase a quantity of drugs from the defendant. *Id.* When the door was opened, the undercover officer slipped into the apartment and moved quickly to the bedroom. *Id.* The other officers were delayed in entering the apartment because the person that opened the door tried unsuccessfully to close the door on them once the undercover officer had slipped through. *Id.* As the other police officers entered the apartment, they heard a "rapid volley of shots" from the bedroom, and the undercover officer thereafter emerged and collapsed on the floor. *Id.* After the shooting, the other police officers performed a quick search of the apartment because they ***15** thought that other persons in the apartment might have been injured. *Id.* at 388. In their search they found a young woman who was wounded in the bedroom closet, the defendant who was apparently unconscious in the bedroom, and three of the defendant's acquaintances in the living room (one of whom had been wounded in the head). *Id.* Emergency assistance was thereafter requested, and some medical aid was rendered to the undercover officer. *Id.* These officers neither conducted a further search of the apartment nor seized any evidence; they merely guarded the suspects and the premises. *Id.*

However, within ten minutes after the initial search of the apartment, homicide detectives arrived and took charge of the investigation, which lasted four days. *Id.* at 388-89. Their investigation included searching for and gathering evidence by opening drawers, closets, and cupboards, and inspecting their contents; emptying clothing pockets; digging bullet fragments out of the walls and floors; and pulling up sections of the carpet and removing them for examination. *Id.* at 389. A warrant for this subsequent search and seizure was never obtained. *Id.*

In pertinent part, the Court "d[id] not question the right of the police to respond to emergency situations." *Id.* at 392. Recognizing that "[t]he need to protect and preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency[,]" *id.* (quoting *Wayne*, 318 F.2d at 212) (internal quotation marks omitted), the Court explained that, "when the police come upon the scene of a homicide[,] they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises[,]" and "may seize any evidence that is in plain view during the course of their legitimate emergency activities." *Id.* at 392-93. The Court's explanation was made in light of its observation that "[n]umerous state[] and federal[] cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." *Id.* at 392 & nn. 6 & 7 (footnotes omitted).

However, the Court cautioned that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation[.]"' *Id.* at 393 (quoting *Terry v. Ohio*, 32 U.S. 1, 25-26 (1968)). As such, the Court held that "it simply cannot be contended that [the subsequent four-day search of the apartment] was justified by any emergency threatening life or limb" because (1) "[a]1*l* the persons in [the defendant's] apartment had been located before the ***16** search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search." *Id.*

More recently, in *Brigham City*, the Court emphasized that the objectivity of the Fourth Amendment inquiry does not consider the individual police officer's subjective motivations. *See* 547 U.S. at 404. Indeed, as explained above, the reasonableness standard "is an objective one," and "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396-97; *see Brigham City*, 547 U.S. at 404 ("The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment...; the issue is not [the individual officer's] state of mind, but the objective effect of his actions." (Quoting *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000).) (Internal quotation marks omitted.)). The Court thus employed the following two-step test: (1) "whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury[,]" *id.* at 400; and, assuming the first step is satisfied, (2) whether "the manner of the officers' entry was also reasonable," *id.* at 406.

The Court ostensibly framed the first step of its analysis in the context of the facts before it. In *Brigham City*, four police officers responded to a call regarding a loud party at a residence. *Id.* at 400-01. Upon their arrival, the officers heard shouting from within the residence. *Id.* at 401. While in the backyard, the officers saw an altercation taking place in the kitchen of the home where a juvenile was observed striking an adult in the face that caused the adult to spit out blood into a nearby sink. Id. One of the officers then opened the screen door and announced his presence, but no one noticed. *Id.* The altercation eventually ceased when the officer entered the kitchen and aain announced his resence. *Id.*

Against this backdrop, the Court explained that police officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Id.* at 403. In this context, the Court held that "the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning." *Id.* at 406.

Subsequent decisions by the Court have reframed the first step's inquiry based on the particular facts before it. *See Michigan v. Fisher*, 130 S. Ct. 546, 549 (2009) (per curiam). In Fisher, police officers responded to a disturbance complaint and, while approaching the area, the ***17** officers were directed by a couple to a residence where a man was "going crazy." *Id.* at 547. When they arrived at the scene of the reported disturbance, they "found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside." *Id.* The officers also observed blood on the hood of the pickup truck and on clothes inside of it, as well as on one of the doors to the house. *Id.* The officers observed the respondent through a window, screaming and throwing things, and that the back door was locked and had a couch positioned in a manner that blocked the front door. *Id.*

In Fisher, the Court framed the issue as "whether there was 'an objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger[.]" Id. at 549 (quoting Brigham City, 547 U.S. at 406). Notwithstanding the Court's use of different language in framing the issue, compare id., with Brigham City, 547 U.S. at 400, the State points out that the exigent circumstances exception to the warrant requirement is ultimately concerned with a police officer's "need to protect or preserve life or avoid serious injury," which serves as "justification for [a search that] would be otherwise illegal absent an exigency or emergency." Brigham City, 547 U.S. at 403 (quoting Mincey, 437 U.S. at 392) (internal quotation marks omitted). Regardless of how the first step is framed the inquiry remains the same - there must be an objectively reasonable basis that is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." See Fisher, 130 S. Ct. at 549; Graham, 490 U.S. at 396-97; cf. Bonnell, 75 Haw. at 137, 856 P.2d at 1273 ("[A] search is not... made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." (Internal quotation marks and citation omitted.)); State v. Pires, 201 N.W.2d 153, 157 (Wis. 1972) ("The fact that, in reality, no one was in the dwelling, does not alter the justification for the initial entry.").

In comparing *Fisher* with *Brigham City*, the Court explained:

> A straightforward application of the emergency aid exception, as in *Brigham City*, dictates that the officer's entry was reasonable. Just as in *Brigham City*, the police officers here were responding to a report of a disturbance. Just as in *Brigham City*, when they arrived on the scene they encountered a tumultuous situation in the house - and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City*, the officers could see violent behavior inside. Although Officer Goolsby and his partner did not see punches thrown, as did the officers in *Brigham City*, they did see Fisher screaming and throwing ***18** things. *It would be objectively reasonable to believe that Fishers projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage.* In short, we find it as plain here as we did in *Brigham City* that the officer's entry was reasonable under the Fourth Amendment.

Fisher, 130 S. Ct. at 548-49 (emphasis added). In reversing the Michigan Court of Appeals, the Supreme Court explained that police officers "do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid

exception[,]" and "[i]t was error for the [state court of appeals] to replace th[e] objective inquiry into appearances with its hindsight determination that there was in fact no emergency." *Id.* at 549.

3. The objectively reasonable inquiry in the context of a 911 call.

It has been observed that "[a] 911 call is one of the most common - and universally recognized - means through which police and other emergency personnel learn that there is someone in a dangerous situation who urgently needs help." United States v. Richardson, 208 F.3d 626, 630 (7th Cir.), cert. denied, 531 U.S. 910 (2000). "The whole point of the 911 system is to provide people in need of emergency assistance an expeditious way to request it." Johnson v. City of Memphis, 617 F.3d 864, 870 (6th Cir. 2010), cert. denied, 131 S. Ct. 1478 (2011); id. ("[A] 911 call is by its nature an appeal for help in an emergency[.]"). "Many 911 calls are inspired by true emergencies that require an immediate response[,]" Richardson, 208 F.3d at 629, and, "in many communities, the use of 911 for any purpose other than to report an emergency or to request emergency assistance is at least a misdemeanor offense[,]" Johnson, 617 F.3d at 870. See HRS § 710-1014.5(2) (Supp. 2005) (mandating that the misuse of the 911 emergency telephone system is a misdemeanor); H. Stand. Comm. Rep. No. 129, in 2005 House Journal, at 1096 ("Your Committee finds that [House Bill No. 313] will prevent public safety agencies from wasting their time on false alarms and ensure that legitimate emergency requests are not hampered by the **abuse** of this emergency system.").

Hawai'i's Legislature in particular enacted HRS § 710-1014.5 in 2005 to "creat[e]... a misdemeanor offense [that] will deter potential **abuse** of the 911 emergency telephone system as well as ensure that this system is reserved for individuals who legitimately require immediate assistance." S. Stand. Comm. Rep. No. 1297, in 2005 Senate Journal, at 1648.

> [The Senate Judiciary and Hawaiian Affairs committee found] that the 911 emergency telephone system functions as an important lifeline for Hawaii's citizens who may require the immediate assistance of medical, ***19** fire fighting, and law enforcement personnel. The misuse of the 911 emergency telephone system not only wastes valuable public resources in responding to false emergencies, but also diverts critical police, firefighter, and emergency personnel from legitimate needs.

Id.

"The efficient and effective use of the emergency response networks requires that the police (and other rescue agents) be able to respond to such calls quickly and without unnecessary second-guessing." *See Richardson*, 208 F.3d at 630; *see also Wayne*, 318 F.2d at 212. In this light, "[a] myriad of circumstances could fall within the terms 'exigent circumstances[]"' - for example, "smoke coming out a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, [or] *reasonable grounds to believe an injured or seriously ill person is being held within."*Wayne, 318 F.2d at 212 (emphasis added); see Fisher, 130 S. Ct. at 549 ("Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception."); *United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995) ("We do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams. Doubtless outcries would justify entry,... *but they are not essential."* (Emphasis added.)).

Briefly summarized, in *Johnson*, two police officers were notified by dispatch to respond to a "911 hang call" from a certain address. 617 F.3d at 866. A "911 hang call" occurs when a caller dials 911, hangs up before speaking with the operator, and the operator is unable to reach the caller when attempting to return the call. *Id.* at 866 n.1. The first officer that arrived at the address approached the front of the house and noticed that the front door was wide open. *Id.* at 866. This officer announced his presence, but received no response. *Id.* Thereafter, the officer, together with a second officer that has since arrived at the address, entered the premises with their weapons drawn. *Id.* According to the officers, they agreed to sweep the premises to make sure that no one was hurt or in need of assistance. *Id.*

The Sixth Circuit held that "the combination of a 911 hang call, an unanswered return call, and an open door with no response from within the residence is sufficient to satisfy the exigency requirement." *Id.* at 869-70. The court reasoned that, "[b]ecause a 911 call is by its nature an appeal for help in an emergency, the emergency aid exception best fits the attitude of police responding to a 911 call under the circumstances present [in its case]." *Id.* at 870. Indeed, "911 hang-up calls do convey information" in that they "inform the police that someone ***20** physically dialed 9-1-1, the dedicated emergency number, and either hung up or was disconnected before he or she could speak to the operator." *Id.* at 871 (emphasis in original). Where the officer is also aware of an unanswered return call, that unanswered return call "gives further information [to the officer] pointing to a probability[] that after the initial call was placed the caller or the phone has somehow been incapacitated." *Id.*

"Given the information he had," the first officer that arrived at the address "had an objectively reasonable basis for believing that a person within [the house] [was] in need of immediate aid." *Id.* at 870 (citation and internal quotation marks omitted). In this situation, the court held that "[t]he officers' actions - announcing their presence and, after receiving no answer, entering in order to perform a cursory search for any endangered or injured persons - was an objectively reasonable response." *Id.*

Similarly, in *Najar*, 451 F.3d at 712, a police dispatcher received a 911 call and, upon answering the call, was met with silence and then a disconnect. The dispatcher thereafter made several attempts to reach the 911 caller, but each time his call was answered the line quickly disconnected without a word uttered. *Id.* The dispatcher sent police officers to investigate and, upon their arrival at a mobile home, the officers knocked on the door and announced their presence. *Id.* No one answered the door. *Id.* at 716. The residence was quiet but the lights were on. *Id.* While the officers walked around the trailer, a person could be seen and heard within the home but would not respond to the officers. *Id.* These officers then contacted their supervisor who arrived and instructed the officers to use the butt end of their flashlight and their fists and to announce their presence in an even louder tone. *Id.* As the occupant continued to move about, the officers persisted, with increasing vigor, to attract the occupant's attention. *Id.* at 712. Eventually, the defendant came to the door, denied making a 911 call, and related to the officers that no other person was present in the home. *Id.* Apparently not believing the defendant's representation to them and fearful that someone else was within the mobile home, the officers entered over the defendant's objection. *Id.* One of the officers went to the area where the defendant had been seen moving about to search for a possible victim, and an uninjured woman was discovered. *Id.* The other two officers stayed near the door and noticed a shotgun in the living room, which they seized. *Id.* The defendant was charged with being a felon in possession of a firearm in violation of federal law, *id.*, and the trial court denied the defendant's motion to ***21** suppress because it concluded that exigent circumstances justified the officers' warrantless entry into the trailer. *Id.* at 717.

On appeal, the Tenth Circuit affirmed the trial court's denial of the defendant's motion to suppress because (1), "[g]iven the totality of the circumstances, the officers had reasonable grounds to believe that someone inside the trailer may have been in need of emergency aid and immediate action was required[,]" and (2) the officers "confined the[ir] search to only those places inside the home where an emergency would reasonably be associated." *Id.* at 720. With regard to its first holding, the court "evaluate[d] whether the officers were confronted with reasonable grounds to believe there was an immediate need 'guided by the realities of the situation presented by the record' from the viewpoint of 'prudent, cautious, and trained officers."' *Id.* at 718-19 (citation omitted). From this viewpoint, the court held in pertinent part that (1) the thirty minute delay between the time the officers arrived and the time they entered the defendant's home "d[id] not obviate the existence of an emergency" because the delay was "caused by a reasonable investigation into the situation facing the officers," *id.* at 719, and (2) "[a] reasonable person could well be concerned that someone was trying to prevent communication with safety officials, not merely avoid it[,]" when the officers were aware that someone was answering the phone but immediately hung up.

4. It was objectively reasonable for the officers to enter and search Unit A for Rosskopf or any person therein that required emergency aid.

Again, whether exigent circumstances exist depends on the totality of the facts and circumstances of each case. *See Jenkins*, 93 Hawai'i at 102, 997 P.2d at 28. As such, it is unlikely that any two cases will contain facts identical to one another. *See Crouser*, 81 Hawai'i at 10, 911 P.2d at 730. However, the cases relied upon *supra* are instructive insofar as their combined analyses illustrate the circuit court's clearly erroneous findings and conclusions here.

The totality of the circumstances of this case clearly reveals that Officers Zanella, O'Neal and Tamayori had "'an objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger [.]" *Fisher,* 130 S. Ct. at 549 (citation omitted). Furthermore, their objectively reasonable basis is based on specific and articulable facts. *See Jenkins,* 93 Hawai'i at 102, 997 P.2d at 28.

Officers Zanella and O'Neal arrived at Unit B in response to a "drop 911 call" where someone either hung up or there was an "open line 911 call with static heard." JEFS Dkt. #17 at ***22** 5-6, 57. "The whole point of the 911 system is to provide people in need of emergency assistance an expeditious way to request it." *Johnson,* 617 F.3d at 870. A "drop 911 call," like a "911 hang-up call [,]" "*do[es]* convey information" in that it "inform[s] the police that someone physically dialed 9-1-1, the dedicated emergency number, and either hung up or was disconnected before he or she could speak to the operator." *Id.* at 871 (emphasis in original). That disconnection could have occurred because the caller was somehow incapacitated. *see id.* Indeed, Officer Zanella testified that she has "been to several drop calls where we found the person unconscious [,]" JEFS Dkt. #17 at 25, and Officer Tamayori testified that he could recall "three specific instances... in detail... [where he] had to perform CPR on someone... JEFS Dkt. #17 at 93. All "drop 911 calls" are classified as a "Priority 1" or emergency call that requires an officer to respond "in an expedited manner" and conduct a follow-up investigation. JEFS Dkt. #17 at 57, 71, 91-92.

Additionally, similar to an unanswered return call, where the officer is aware of an "open line 911 call with static heard," that "open line 911 call" likewise "gives... information [to the officer] pointing to a probability [] that after the... call was placed the caller or the phone has somehow been incapacitated." *See id.* Depending on the circumstances, an open line 911 call with static heard may not evince an emergency if the record reflects that the officers were aware that such calls are not priority calls for them and that "line problems or bad weather sometimes cause static-only telephone calls [.]" *See United States v. Martinez,* 643 F.3d 1292, 1294 (10th Cir. 2011). The record of this case does not reflect that the officers had such knowledge here. JEFS Dkt. #17 at 57, 71, 91-92.

When Officers Zanella and O'Neal arrived at Unit B, Burgess (1) informed them that Rosskopf used to live in Unit B, but now lived in Unit A, JEFS Dkt. #17 at 9, (2) seemed concerned to them because she understood that Rosskopf was **elderly** and suffering from health problems - namely, prostate cancer, JEFS Dkt. #17 at 9, 59, and (3) informed the officers that the 911 call did not originate from her house. JEFS Dkt. #17 at 87-88. There is nothing in the record to indicate that the officers disbelieved Burgess' representations to them. *See* JEFS Dkt. #17 at 36-37.

When they arrived at Unit A, the totality of the circumstances indicated that someone was home at that time - while outside the home they noticed that the lights were on, two air conditioning units were in operation, the Unit's interior was a mess, JEFS Dkt. #5 at 109, and both a sliding glass door and screen door were completely wide open such that "anybody or ***23** anything could walk right in." JEFS Dkt. #17 at 62, 12-13. However, no one responded to the officers when they knocked on the front door, announced their presence, and called out for anyone in the home, including Rosskopf. JEFS Dkt. #17 at 10, 61. No one responded as the officers walked around the Unit while continuing to call for anyone within, JEFS Dkt. #17 at 10, 12, 62, and no one responded when they were outside the wide open sliding glass door "calling out police, is anyone home," while waiting for approximately ten minutes for Officer Tamayori's arrival, JEFS Dkt. #17 at 66.

Inasmuch as (1) a drop 911 phone call constituted the reason they were there in the first place, (2) the officers knew that the phone number that placed the 911 call was registered to Rosskopf, (3) Rosskopf was **elderly**, residing in Unit A, and was suffering from health problems - prostate cancer in particular, (4) the condition of Unit A indicated to the officers that someone could have been home at that time, and (5) no one responded to the officers' repeated attempts to attract the attention of anyone who might be in Unit A, the totality of just these circumstances alone viewed from the perspective of prudent, cautious, and trained officers (as opposed to the subjective motivations of the individual officers themselves) manifestly indicates it was objectively reasonable to believe that someone was home but could not respond to the officer's calls because they were incapacitated in some manner, such as from an illness or, for example, a heart attack. *See Fisher,* 130 S. Ct. at 548-49; *Johnson,* 617 F.3d at 870; *Najar,* 451 F.3d at 719. Again, "[t]he role of a peace officer includes" not only "preventing violence and restoring order,"

but also "rendering first aid to casualties." *Brigham City*, 547 U.S. at 406; *see Fisher*, 130 S. Ct. at 549 ("Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception.").

In addition to the above facts, the officers testified that they observed a gun with a silencer attached to it through a bedroom window. JEFS Dkt. #17 at 10, 64. The gun and their knowledge of the purpose of a silencer provides an additional basis for the officers to enter Unit A in order to ascertain whether anyone within required emergency aid. JEFS Dkt. #17 at 64, 96. More specifically, it was objectively reasonable for the officers to believe any one or all of the following scenarios in light of the totality of the circumstances confronting them: (1) that someone could have been injured from the gun they observed, was still within the home, and was unconscious from the injury; (2) a suicide occurred within the home; or (3) someone entered the home, was in the process of burglarizing it when the police arrived, and, in burglarizing the ***24** home, Rosskopf or another person could have been in the unit at the time, thus creating a hostage situation. Under these circumstances, it is objectively reasonable for the officers to enter Unit A and conduct a brief search of the premises not only to determine whether anyone within is in need of emergency aid, but also to protect any occupants therein or themselves. *See Ryburn*, 132 S. Ct. at 991 (holding that, under the circumstances of its case, "reasonable officers in the position of [the officers] could have come to the conclusion that there was an imminent threat to their safety and to the safety of others"); *Mincey*, 437 U.S. at 392-93 (explaining that "when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises[,]" and "may seize any evidence that is in plain view during the course of their legitimate emergency activities"); *United States v. Washington*, 573 F.3d 279, 288 (6th Cir. 2009) ("In burglary cases, the possibility that a lawful resident has been injured or is being held hostage gives rise to exigent circumstances."); *Frunz v. City of Tacoma*, 468 F.3d 1141, 1145 (9th Cir. 2006) ("Normally, when officers suspect a burglary in progress, they have no idea who might be inside and may reasonably assume that the suspects will, if confronted, flee or offer armed resistance. In such exigent circumstances, the police are entitled to enter immediately, using all appropriate force."); *see also Fisher*, 130 S. Ct. at 549; *Wayne*, 318 F.2d at 212 ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."); *id.* ("Even the apparently dead are saved by swift police response."); *cf* JEFS Dkt. #17 at 67 (Officer O'Neal opining that the totality of the circumstances indicated to him that "someone was... injured,... committed suicide possibly, we had that happen[,]" "someone entered this home and robbed the residence, shot the person that was in there," or "anything could have happened").

Contrastingly, the officers did not force their way into what they thought was either a separate unit or basement underneath the unit they searched. JEFS Dkt. #17 at 17, 88. Unlike the unit they searched, the structure below Unit A appeared "locked and secured" to the officers, and when they knocked and called for Rosskopf they received no response. JEFS Dkt. #17 at 17-18.

For these reasons, the totality of the facts and circumstances in this case clearly indicates that it was objectively reasonable for the officers to enter Unit A to conduct a brief search of the premises to extinguish any uncertainty regarding whether Rosskopf or anyone in Unit A required ***25** emergency aid. *See Fisher*, 130 S. Ct. at 548-49; *Mincey*, 437 U.S. at 392-93; *Johnson*, 617 F.3d at 870; *Najar*, 451 F.3d at 719; *Wayne*, 318 F.2d at 212.

5. The circuit court's Conclusion of Law No. 5 is wrong, and Findings of Fact Nos. 1,4, 5, 7,10 and Conclusion of Law No. 7 are clearly erroneous.

Rather than viewing the totality of the facts and circumstances confronting the officers on December 3, 2010, *see Jenkins*, 93 Hawai'i at 102, 997 P.2d at 28, the circuit court instead chose to dissect each element that comprised the situation confronting the officers and explain why each element separately did not warrant the conclusion that an exigency existed here. JEFS Dkt. #17 at 119-23; *see Ryburn*, 132 S. Ct. at 991-92. Had the circuit court viewed the totality of the circumstances to discern whether it was objectively reasonable for the officers to enter Unit A to provide emergency aid, the circuit court would have realized that "[t]he very uncertainty created by the totality of all the[] circumstances created a justification, and actually a need, for the police to take immediate action." *See People v. Brooks*, 289 N.E.2d 207, 210 (Ill. App. Ct. 1972).

At the hearing on Defendant's motion, the circuit court began its explanation of an imminent danger to life by relying on the ordinary meaning of the word “imminent,” and then supplying its own examples of what it considered to be “imminent.” JEFS Dkt. #17 at 120. The circuit court explained that, because Officers Zanella and O'Neal waited for ten minutes for Officer Tamayori to show up, exigent circumstances were absent because, according to the circuit court, “[e]xigent circumstances is where the police have to immediately respond.” JEFS Dkt. #17 at 121.

However, a ten minute delay does “not obviate the existence of an emergency” when the delay is “caused by a reasonable investigation into the situation facing the officers[.]” *See Najar*, 451 F.3d at 719. In this case, the circuit court found that Officers Zanella and O'Neal “were not that experienced [,]” Officer Tamayori “is more experienced” than them, and Officers Zanella and O'Neal “called [Officer Tamayori] out there to run it by him to see what they should do.” JEFS Dkt. #17 at 121. While they were waiting for Officer Tamayori to arrive, Officers Zanella and O'Neal continued “calling out police, is anyone home,” while outside the open sliding glass door. [3] JEFS Dkt. #17 at 66. Officers Zanella's and O'Neal's decision to wait for a more ***26** experienced officer is manifestly reasonable given their level of experience and in light of the gun they observed, JEFS Dkt. #17 at 13, 76, and certainly did not “obviate the existence of [the] emergency.” *See id.*

Additionally, the circuit court clearly thought that the officers made a mistake by going to Unit A instead of focusing its investigation on Unit B, where they met Burgess. JEFS Dkt. #17 at 113-14, 118. Even though the circuit court related at the hearing that it did not base its decision on what it thought should have been done, JEFS Dkt. #17 at 118, the circuit court implicitly found that the officers should have investigated Unit B instead of Unit A in its Finding of Fact No. 4. JEFS Dkt. #5 at 108. However, what the circuit court thought should have been done and, consequently, Finding of Fact No. 4, is clearly erroneous based on the testimonies of the officers it found to be credible. JEFS Dkt. #17 at 121.

More specifically, there is nothing in the record that indicates that Officers Zanella and O'Neal disbelieved any of Burgess' representations to them, and both officers testified that they were aware from prior experience that police dispatch sometimes gives them an incorrect address. JEFS Dkt. #17 at 54, 73, 87. By going to Unit A, the officers ostensibly believed the information that Burgess gave them, including that the call did not originate from her house. JEFS Dkt. #17 at 72, 87. However, by essentially second-guessing the officers' assessment of Burgess' credibility and their prior experience with the accuracy of the information they receive from police dispatch, the circuit court, “[w]ith the benefit of hindsight and calm deliberation,” remarkably and implicitly thought that the officers should not have believed Burgess' representation to them, and should have ignored their prior experiences with regard to the accuracy of the information that dispatch provides to them. *See Ryburn*, 132 S. Ct. at 991-92.

A finding more consistent with the evidence presented at the hearing would have acknowledged the possibility that Rosskopf could have transferred his phone number from Unit B to Unit A when he moved to Unit A, but the transfer had not yet been updated in the information given to the officers by dispatch. JEFS Dkt. #17 at 54, 87. Therefore, “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” a reasonable officer would have investigated not only the address provided by ***27** dispatch, but also the name of the person that the phone number is registered to, *see Graham*, 490 U.S. at 396, which is *exactly* Officer Zanella's testimony. JEFS Dkt. #17 at 54. Accordingly, Finding of Fact No. 4 is clearly erroneous because it is unsupported by substantial evidence appearing in the record. [4] *See Edwards*, 96 Hawai'i at 231, 30 P.3d at 245.

The circuit court also chose to dissect the presence of the gun from the totality of the facts and circumstances and opine that, because no one was around the gun at the time, “[n]othing prevented [the officers] at that point to seal the situation, maybe surround the house, call for further back-up and get a search warrant.... JEFS Dkt. #17 at 122; *see* JEFS Dkt. #17 at 110 (FOF 10). “But that is the world of the poet, not the police.” *Najar*, 451 F.3d at 719. By focusing on the gun, the circuit court “implicitly rejected” or ignored the other facts and circumstances that confronted the officers at that time, such as those facts indicating that someone was home and the officers' knowledge that Rosskopf lived in that unit, was **elderly**, and ***28** had health problems. *See Ryburn*, 132 S. Ct. at 991; *see also supra* Section IV.A.4 “[I]t is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may [nonetheless] paint an alarming picture.” *See id.* That “alarming picture” is painted, supra, in Section IV.A.4 As in *Ryburn*, “[w]ith the benefit of hindsight and calm deliberation,” the circuit court

clearly "second-guess[ed]" the officers' assessment "made on the scene" in order to conclude that exigent circumstances did not exist here. *See id.* at 991-92.

Additionally, the State points out that this jurisdiction has recognized that "[a] search is not... made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *Bonnell*, 75 Haw. at 137, 856 P.2d at 1273 (internal quotation marks and citation omitted). Prior to their entry into Unit A, it was objectively reasonable for the officers to believe that someone was home at that time, but could not respond to them because they were incapacitated and out of sight of the officers while they were outside the home. *See supra* Section IV.A.4. The fact that they were unable to locate anyone within Unit A "does not alter the justification for the initial entry." *See Pires*, 201 N.W.2d at 157. As such, Finding of Fact No. 5 is clearly erroneous insofar as the circuit court relied upon it in assessing the totality of the circumstances because it overlooks that it was objectively reasonable for the officers to believe that someone was inside the home at that time notwithstanding the fact that they could hear no voices or perceived movements within the home, or see any person therein. *See Edwards*, 96 Hawai'i at 231, 30 P.3d at 245. Likewise, Finding of Fact No. 10 is in part clearly erroneous because, although it is supported by substantial evidence, a mistake was clearly made insofar as the circuit court relied upon the fact that "[n]o person was ever found or located in the house [during the search]" in its assesment of the totality of the circumstances.

Moreover, nowhere in the circuit court's written January 13, 2012 Findings of Fact, Conclusions of Law, and Order does it consider (1) whether providing emergency aid constitutes an exigent circumstance, and (2) whether the totality of the facts and circumstances in this case indicates that it was objectively reasonable for the officers to enter and search Unit A to discern whether any of the occupants therein - i.e. Rosskopf- required emergency aid. *See* JEFS Dkt. #5 at 107-12. The circuit court seems to have acknowledged as much at the hearing on Defendant's motion when it confined its analysis only to whether an imminent danger to life was present and, at the same time, mentioned that it was "not saying that [the officers] shouldn't have gone in because maybe somebody was, you know, hurt or something." JEFS Dkt. #17 at 123. ***29** Indeed, the circuit court was clearly under the impression that an imminent danger to life is present only where the circumstances paint a picture similar to *Lloyd's* description of an imminent danger to life. *Compare* 61 Haw. at 512 n.5, 606 P.2d at 918 n.5, *with* JEFS Dkt. #17 at 120-21 (providing what it thought were examples of "[c]lassic instances" of an imminent danger to life). The circuit court continued by opining: "Maybe the appellate courts will disagree with me and say, no, *it's not just imminent danger to life*, but in a situation like this, it was reasonable for them to go in the house...." JEFS Dkt. #17 at 123 (emphasis added).

For this reason, Conclusion of Law No. 5 is wrong because an exigent circumstance is truly not just about an imminent danger to life, as explained by *Lloyd. See Brigham City*, 547 U.S. at 403; *see also Kaleohano*, 99 Hawai'i at 375, 56 P.3d at 143. Instead, an exigent circumstance generally exists "when the demands of the occasion reasonably call for an immediate police response[,]" *see Jenkins*, 93 Hawai'i at 102, 997 P.2d at 28, and thus includes situations where a person requires emergency aid, *see Fisher*, 130 S. Ct. at 549. Therefore, Conclusion of Law No. 7 is clearly erroneous because it is based on facts that are cast in an incorrect light when the circuit court used a standard that obviously differed from that provided by the Supreme Court in *Brigham City*, *Fisher*, and *Ryburn.*

6. The manner of the officers' search was reasonable.

In *Najar*, 451 F.3d at 712, the officers searched the area where they observed the defendant moving about within the mobile home to search for a possible victim. The Tenth Circuit held that the officers "reasonably effected the search" by "confin[ing] the search to only those places inside the home where an emergency would reasonably be associated." *Id.* at 720; *see Brigham City*, 547 U.S. at 407 (holding that "it would serve no purpose to require [the officers] to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.").

Contrastingly, in *Mincey*, 437 U.S. at 393, the Court explained that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation[.]"' (Quoting Terry, 32 U.S. at 1). Under the circumstances of its case, the Court held that "it simply cannot be contended that [the subsequent four-day search of the apartment] was justified by any emergency threatening life or limb" because (1) "[a]ll the persons in [the defendant's] apartment had been located before the investigating

homicide officers arrived there and began their search[,]" and (2) ***30** "the four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search." *Id.*

The search in this case is unlike *Mincey*. Officers Zanella, O'Neal and Tamayori did not open and inspect dresser drawers, cupboards, empty clothing pockets, and rip up carpets. *See id.* at 389. Instead, their search lasted no longer than five minutes, JEFS Dkt. #17 at 40, and was confined only to those areas of the home where an injured person could be found, such as inside rooms and closets. See id. at 388 (finding a wounded young woman in the bedroom closet during the initial search for other victims after the shooting); JEFS Dkt. #17 at 15-17, 32-33, 35-36, 38, 68. While searching the interior of Unit A, the officers continued to knock on closed doors and call for anyone who may be inside the home, including Rosskopf. JEFS Dkt. #17 at 35. The doors to the two bedrooms where the officers found the marijuana plants were closed, but unlocked. JEFS Dkt. #17 at 16, 35-36. Even after they saw the numerous marijuana plants in the two bedrooms, the officers did not consider getting a warrant at that time because they were looking for an injured person, JEFS Dkt. #17 at 42, and in fact searched those two bedrooms for any injured people, JEFS Dkt. #17 at 16. Similarly, although Officer Zanella jotted down the serial number of the gun, it was objectively reasonable for her and the other officers to search within and beyond the room where the gun was located for any injured person. *See supra* Section IV.A.4. "[I]n the course of conducting a reasonable search the[officers] did not have to blind themselves to what was in plain sight simply because it was disconnected with the purpose for which they entered." *See People v. Roberts*, 47 Cal. 2d 374, 379, 303 P.2d 721, 723 (1956). Therefore, the manner of the officers' search in this case was reasonable because it was strictly circumscribed by the exigencies which justified its initiation. *See Mincey*, 437 U.S. at 393. In other words, the officers "did not attempt to search any place beyond the locations where a victim might likely be found." *See Najar*, 451 F.3d at 720.

B. The Marijuana Plants Were In Plain View.

"The plain view doctrine dictates that: if the original intrusion is justified, such as by consent, hot pursuit, warrant or as incident to an arrest, objects sighted in plain view will be admissible so long as the view was inadvertent." *State v. Vallesteros*, 84 Hawai'i 295, 304, 933 P.2d 632, 641 (1997) (internal quotation marks and citation omitted).

As described *supra*, in Section IV.A.4, the original intrusion into Unit A was justified by the exigency of providing emergency aid. It was only after they entered the home that the ***31** officers noticed an odor resembling marijuana, and then observed numerous marijuana plants after opening the unlocked doors to two of the unit's bedrooms. JEFS Dkt. #17 at 35-36. The officers did not enter Unit A because they thought that there was a marijuana growing operation therein. Therefore, the officers' discovery of the marijuana plants was inadvertent and, consequently, in plain view. *See Vallesteros*, 84 Hawai'i at 304, 933 P.2d at 641. Accordingly, for all of these reasons the circuit court erred by granting Defendant's Motion to Suppress Evidence. *See Edwards*, 96 Hawai'i at 231, 30 P.3d at 245.

V. CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that this Court vacate the circuit court's January 13, 2012 Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion to Suppress Evidence, and remand the case for trial and with instructions to deny Defendant's Motion to Suppress Evidence.

Footnotes

1 Any record citation that is available in electronic format in the Judicial Information Management System (JIMS) will be cited as "Judicial Electronic Filing System Docket #__ ('JEFS Dkt. #') at [page number of PDF file]."

2 The gun later turned out to be an airsoft gun, JEFS Dkt. #17 at 34, and the gun itself did not have an "orange color at the top of the barrel [.]" JEFS Dkt. #17 at 68. The officers were not informed that it was an airsoft gun until after they had searched and exited Unit A. JEFS Dkt. #17 at 34.

3 Finding of Fact No. 7 is clearly erroneous because it is an incomplete statement of fact. Although it is supported by substantial evidence, Officer O'Neal testified that, while they were waiting for Officer Tamayori to arrive, they continued to "call[] out police, is anyone home[.]" JEFS Dkt. #17 at 66. Officer Zanella also testified that they continued to call out for Rosskopf while waiting for Officer Tamayori. JEFS Dkt. #17 at 31. The circuit court found both Officers Zanella's and O'Neal's testimonies about what happened on December 3, 2010, credible. JEFS Dkt. #17 at 121.

4 Finding of Fact No. 4's statement that "[t]he officers did not conduct any further investigation of the drop call at Unit B" is also clearly erroneous because the finding ignores Burgess' representation to the officers that the 911 phone call did not originate from her home. This information is derived from Officer O'Neal's testimony, which the circuit court expressly found to be credible. JEFS Dkt. #17 at 121.

Additionally, the circuit court found both Officers Zanella and O'Neal credible. JEFS Dkt. #17 at 121. At the same time, the circuit court found that "[p]olice information was that there was a landline telephone registered to Rosskopf at [Unit B]." JEFS Dkt. #5 at 108 (FOF 1). However, Officer Zanella's and O'Neal's testimonies conflict with one another in that Officer Zanella testified that she was unaware whether the phone number was from a cellular phone or a landline, JEFS Dkt. #17 at 53, whereas Officer O'Neal merely "believe[d] it was a land line[.]" JEFS Dkt. #17 at 73, 86. Because of the conflicting testimonies of these credible witnesses, Finding of Fact No. 1 is clearly erroneous because it is unsupported by substantial evidence; namely, there was no "police information" that indicated to the officers that the phone number "was a landline telephone [number] registered to Rosskopf." *See Edwards*, 96 Hawai'i at 231, 30 P.3d at 245.

Notwithstanding the conflicting testimonies, because both officers testified that in their experience police dispatch sometimes provides them with an incorrect address, JEFS Dkt. #17 at 54, 87, Finding of Fact No. 1 relating to whether the phone number was from a landline or cellular phone is also inconsequential. Indeed, it is entirely possible that Rosskopf could have transferred his phone number from Unit B to Unit A when he moved to Unit A, but the transfer had not yet been updated in the information given to the officers by dispatch. JEFS Dkt. #17 at 54, 87. Therefore, it is objectively reasonable for a "reasonable officer on the scene" to investigate not only the address they were given by dispatch, but also the whereabouts of the person that the phone number is registered to. *See Graham*, 490 U.S. at 396. Accordingly, assuming *arguendo* that Finding of Fact No. 1 is supported by substantial evidence, a mistake was clearly made insofar as the circuit court relied upon it when assessing the totality of the circumstances in this case. *See Jenkins*, 93 Hawai'i at 102, 997 P.2d at 28.

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